

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 05-CV-329-GKF(PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**REPLY OF STATE OF OKLAHOMA IN SUPPORT OF ITS  
MOTION IN LIMINE PERTAINING TO ALLEGED AGENCY INACTION  
AS PRECLUDING PERMANENT INJUNCTIVE RELIEF [DKT. # 2433]**

The State of Oklahoma respectfully submits this reply in support of its Motion *in Limine* pertaining to alleged agency inaction [Dkt. # 2433]. Defendants' response is Dkt. # 2481.

**I. Introduction**

The State filed its motion *in limine* relying upon the well established principles that laches and estoppel do not bar the State from seeking injunctive relief in the public interest. Rather than engage the State's well supported arguments, Defendants merely ignore the law and attempt to concoct arguments to demonstrate the relevance of the inaction of some of the State's agencies. Those arguments present no relevant evidence, and the Court should grant the State's motion.

**II. Defendants simply ignore the law**

Defendants simply sidestep the established law showing that estoppel is not a defense against the State, citing no contrary authority. Defendants do not even *claim* that laches or estoppel *do* apply against the State. Instead, they merely act as if the purported inaction of state agencies is relevant and somehow bars the State from seeking injunctive relief. In essence, Defendants simply ignore the law on a point they cannot win, and proceed as if that law did not

exist.

Rather than meet the State's arguments head on, Defendants also claim the State should have moved for summary judgment instead of *in limine*. However, Defendants cite no case supporting this view. Instead, they cite cases for the proposition that issues raised in the complaint, and not challenged on summary judgment, are deemed waived. *See* Dkt. # 2481, p. 11-12. The present situation is just the opposite: Defendants raised affirmative defenses of laches and estoppel, but wisely did not move for summary judgment on those grounds. The issue is ripe for a motion *in limine*.

Defendants also continue to argue that other agencies have primary jurisdiction, *see* Dkt. # 2481, pp. 5 & 11. The Court properly rejected this theory. *See* Dkt. # 1206. Consequently, this matter is going to trial and will not be sent to any administrative agency under the doctrine of primary jurisdiction. The doctrine of primary jurisdiction presents no basis to make the actions, or inactions, of Oklahoma's agencies relevant in this case.

### **III. Laches and estoppel do not bar the State from seeking an injunction in the public interest.**

It is well established that laches and estoppel do not operate against the State acting in the public interest. *See, e.g., State ex rel. King v. Friar*, 25 P.2d 620, 623 (Okla. 1933) (laches and estoppel do not operate against the state, and no procrastination of public officials prejudices the state, and their tardiness neither bars nor defeats the state from vindicating its sovereign rights, except where positive statutes so provide); *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900, 911 (Okla. 1980) ("it is fundamental that a state and its subdivision cannot be estopped from protecting public rights when public officials have acted erroneously or failed to act"); *Burdick v. Independent School District No. 52 of Oklahoma County*, 702 P.2d 48, 53 (Okla. 1985) ("Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state,

the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a governmental shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties"); *see also Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 & 63 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. . . . [T]he general rule [is] that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law"); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest").

Any party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse. *See, Heckler*, 467 U.S. at 59. Therefore, Defendants cannot claim that they relied on any representation by the State and changed their position for the worse. Moreover, no policy or statutory enactment exists which overrides the usual rule that laches and estoppel do not apply to the State, especially when enforcing sovereign rights of public protection. To the extent Defendants' ill-founded claim that the State consented to their nuisance, *see* Dkt. 2481, p. 9, could be considered an invocation of estoppel, that claim founders upon the fact that Oklahoma law consistently seeks to protect from pollution the environment in general, and the State's waters in particular. For example provisions of (1) the Agriculture Code, *see, e.g.*, 2 Okla. Stat. § 10-9.7(B)(4)(a) and (b) prohibiting contamination of

the waters of the state and creation of environmental or public health hazards<sup>1</sup>, (2) the Environmental Code, *see, e.g.*, 82 Okla. Stat. § 1084.1 declaring water pollution constitutes a menace to public health and welfare and creates public nuisances, and (3) the law regarding public nuisance, *see, e.g.* 50 Okla. Stat. § 7 providing no lapse of time can legalize a public nuisance amounting to an obstruction of public right, consistently prohibit pollution, and in no way lull polluters into improper practices to their detriment. Consequently, no laches or estoppel can operate to bar the State's action for injunctive relief.

#### **IV. Defendants mischaracterize the State's motion**

The State moved *in limine* to prevent evidence or argument that alleged inaction by agencies of the State prevented the State from seeking injunctive relief on the grounds of laches or estoppel. Defendants take this straightforward motion and morph it into a supposed request to limit evidence about the inaction of the State of Arkansas, the Interstate Compact Commission, the EPA, and the Cherokee Nation. *See* Dkt. 2481, p. 2. The State's motion does not address these other various governmental entities. However, the fact that the State did not address them does not mean that their actions or inactions are relevant to the issues in this case. It remains for Defendants to demonstrate at trial how the actions of these agencies make the existence of any fact of consequence more or less probable.

#### **V. Defendants' attempts at distraction are irrelevant and should not be permitted at trial**

Defendants suggest a wide variety of things are relevant that are not, particularly in light of the undisputed fact that laches and estoppel do not apply against the State. For instance, Defendants claim the "complex regulatory systems" governing poultry waste application are

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<sup>1</sup> Even if provisions of the Registered Poultry Feeding Act do not apply to Defendants in their capacity of contractor with growers, the Act's environmental protection provisions negate any inference that Defendants' nuisance is consented to.

relevant. *See* Dkt. # 2481, p. 3. These regulatory systems, and alleged inaction of state agencies, make no fact of consequence in this case more or less probable, and thus they are irrelevant. Fed. R. Evid. 401. The fact that “multiple Oklahoma state agencies have authority to address violations of Oklahoma’s litter regulations...”, *see* Dkt. # 2481, p. 1, similarly makes no fact of consequence to this action more or less probable, and the alleged inaction of those agencies serves neither as a defense to the Defendants, nor as a bar to the prosecution of this case by the State. Contrary to Defendants’ assertions, the alleged inaction of state agencies in using their administrative or police powers, *see* Dkt. 2481, p. 6, is probative of nothing. It is the judgment of the Court, based on evidence of the facts on the ground, and in the water, that will determine the appropriateness of relief.

The State does not ask the Court to be placed in a position of evaluating each individual application of poultry waste, but asks the Court to enjoin land application above the agronomic needs for phosphorus. Thereafter, Defendants will have to ensure that individual land application decisions are made in compliance with that standard, as they did in the *City of Tulsa* case consent decree with the land application standard in play in that case. As is the case now, other limitations on land application already in force in both Oklahoma and Arkansas, such as limitations on application based on slope of the land, thickness of the soil, or proximity to streams and wells, will continue to apply.

What is relevant in this case is the conduct of the Defendants and its effect on the waters of the IRW, not the alleged lack of action by agencies of the states of Oklahoma or Arkansas, or of the Cherokee Nation. The inaction of the State’s agencies neither makes any fact of consequence in this case more or less probable, or serves as a bar to the present suit for injunctive relief.

## VI. Conclusion

For the foregoing reasons, the State asks the Court to grant its motion *in limine* prohibiting evidence or argument of inaction of agencies of the State of Oklahoma as a basis for denying the injunctive relief sought by the State.

Respectfully Submitted,

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